LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 17 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1066

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO and EVERETT A. WHORL,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

EDWARD BENNETT WILLIAMS
PAUL R. CONNOLLY
JOHN W. VARDAMAN, JR.
1000 Hill Building
Washington, D. C. 20006

PETER H. MORRISON
110 East 59th Street
New York, New York 10022

Counsel for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1066

LEWIS L. COLASURDO, MICHAEL J. MCLANEY, ANTHONY CIPO and EVERETT A. WHORL,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY BRIEF FOR PETITIONERS

In its response, the government fails to meet the issues raised in the petition. An analysis of what the government says, and what it does not say, underscores the importance of the issues raised and the appropriateness of the case for certiorari.

1. The government relies on *Salinger* v. *United States*, 272 U.S. 542 (1926) for the proposition that a court may amend the indictment so long as it does

not prejudice the defendant at trial. It suggests that *Ex Parte Bain*, 121 U.S. 1 (1887), which holds to the contrary, has been "limited to its peculiar facts." (Gov. Br. 6). Apparently the government would consign *Ex Parte Bain* to a legal graveyard. This Court has refused to do that. In *Russell* v. *United States*, 369 U.S. 749 (1962) it reaffirmed the holding and the rationale of *Bain*. Two years earlier, the Court observed that *Bain* "has never been disapproved . . ." *Stirone* v. *United States*, 361 U.S. 212, 217 (1960). Indeed it is the continuing vitality of *Bain* and the conflicting decision in *Salinger* which has produced confusion and conflict among the lower courts. Accordingly the issue is a proper and important one for review.

2. Under the government's reading of *Grunewald* v. *United States*, 353 U.S. 391 (1957) the court must determine whether the acts of concealment were undertaken in furtherance of the central objective of the conspiracy or whether they were undertaken after the criminal objectives had been accomplished. In the latter case the evidentiary standards of *Grunewald* apply; in the former they do not. Yet the government does not explain why, if that determination is crucial, it was proper for the court of appeals rather than the jury to make it. Compare *Grunewald* at 406-15.

The government does not attempt to justify the arbitrary distinction created by the decision below between those cases to which *Grunewald* applies and those to which it does not (See Pet. 18-20). Instead

it merely recites the court of appeals' characterization that "concealment was the essence of the object of the conspiracy" (Gov. Br. 8). Both the government and the court of appeals ignored the fact that the indictment, before amendment, charged a conspiracy to defraud shareholders and then to conceal that fraud.[1]

3. Count 26 of the indictment charged that the Crescent certified financial statement for 1965 was false and misleading because it did not disclose that the seller of the blueberry plantation was an affiliated corporation. As we pointed out (Pet. 20-25), the SEC statutes and regulations do not specify that such an affiliation must be disclosed. The government does not dispute that. Instead it attempts to convert the issue into one of good faith and suggests that the element of scienter in the statute makes up for its failure to disclose what conduct it prohibits. The issue, however, is not one of honesty, good faith, or scienter. If the statute and the regulations which govern the content of the report do not require that a particular fact be disclosed, then failure to disclose it should not be criminal, no matter what the defendant's state of mind.

United States v. *Ragen*, 314 U.S. 513 (1942), relied on by the government, is inapposite. There the

---

[1] Much of the evidence at trial concerned the corporate transactions and the alleged fraud on shareholders and creditors. Here the government's Statement is devoted almost exclusively to a description of the corporate transactions rather than the concealment which it alleges was the essence of the conspiracy (See Gov. Br. 2-6).

defendant charged that the term "reasonableness" as used in a provision of the Internal Revenue Code was unconstitutionally vague. In rejecting that contention the Court found that "there has not been any apparent general confusion bespeaking inadequate statutory guidance" and that "experience and common sense" demonstrated that the term was not vague. 314 U.S. at 524. Here just the opposite is the case. The accounting profession, which reflects the "experience and common sense" in this area, is divided over whether affiliations must be disclosed (Tr. 6482-85) and the statute provides no guidance whatsoever.[2]

4. The government argues that to grant petitioners a remedy to determine whether the grand jury acted on evidence obtained in violation of their attorney-client privilege would "impede the progress of a criminal trial" (Gov. Br. 10). That seems unlikely since allowing defense attorneys to inspect the appropriate grand jury minutes would ordinarily be sufficient and would cause no delay.

Moreover, since we assume that it is only in the unusual case that a defendant's attorney is called

---

[2] The government incorrectly states that Colasurdo received a one-year sentence on each of the four substantive counts (Gov. Br. 2, 9, n.4). The only substantive count on which he received a prison sentence was Count 26, on which he received one year. He received a concurrent two-year sentence on the conspiracy count. One of the objects alleged in the conspiracy count was the filing of false statements, including the report on which Count 26 is based. Thus reversal on Count 26 would require an analysis of whether the evidence relating to that report admitted on the conspiracy count tainted the conspiracy conviction.

before the grand jury, if the remedy did cause delay, it would occur infrequently. If, however, we are wrong in that assumption, and defendants' attorneys are summoned before grand juries with some frequency, then it is all the more important that courts inquire whether this practice results in violations of the privilege.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
PAUL R. CONNOLLY
JOHN W. VARDAMAN, JR.
1000 Hill Building
Washington, D. C. 20006

PETER H. MORRISON
110 East 59th Street
New York, New York 10022

Counsel for Petitioners